No. 559

Brf. of Atty. Gen'l

for Respondent.

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In the Supreme Court of the United States.

OCTOBER TERM, 1899.

THE AMERICAN SUGAR REFINING Company, petitioner, v. THE UNITED STATES, RESPONDENT. } No. 559.

ON PETITION FOR CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE UNITED STATES IN OPPOSITION.

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The United States respectfully submits the following points in opposition to this application:

I.

The opinions of the circuit court (Record, p. 30) and of the circuit court of appeals (p. 45) are conclusive on the merits. All aspects of the question are carefully considered, and it is plain therefrom that no legal or equitable claim can be maintained by the importers.

II.

The importers have pursued all their remedies under the customs administrative act. After the usual appraisement they demanded a reappraisement by a general appraiser and a further reappraisement by a board of three general appraisers (pp. 10, 18a). Thereupon, the original appraisement of market value and dutiable value being twice affirmed, the Board of General Appraisers properly overruled the protest, which was in reality against the valuation only (pp. 13, 1–4), and the decision in both appellate courts waives the point of jurisdiction and deliberately determines the case against the importers upon the merits of the question. Certainly under these circumstances the case should be regarded as final in the circuit court of appeals under section 6 of the act of March 3, 1891, especially since there are no conflicting decisions.

III.

The record evidence (pp. 19, 21) and the opinion of the circuit court (p. 32) touch upon the finality of the appraisement. This is in reality the only question involved, and the petition is the last step in an effort to bring the question of value before the courts, notwithstanding the plain provisions of section 13 of the customs administrative act, making the decision on final reappraisement of the board of three general appraisers "conclusive as to the dutiable value of such merchandise against all parties interested therein."

The case of *Auffmordt* v. *Hedden* (137 U. S., 310) carefully reviewed the meaning and intent of the law as

to appraisements prior to the customs administrative act, and held that the valuation of merchandise made by the appraisers is, in the absence of fraud, conclusive on the importer, and that section 2930 of the Revised Statutes was not unconstitutional in making the decision of the appraisers final. And the case of *Passavant* v. *United States* (148 U. S., 214), reviewing many authorities, holds as follows (p. 220):

> The provisions of the customs administrative act of June 10, 1890, as to the finality and conclusiveness of the decision of the Board of General Appraisers as to the valuation of imported merchandise, when that question has been regularly submitted to and examined by them, is expressed in clearer and more emphatic terms than in former statutes. The language is so explicit as to leave no room for construction. In the tariff legislation of the Government, Congress has generally adopted means and methods for a speedy and equitable adjustment of the question as to the market value of imported articles, without allowing an appeal to the courts to review the decision reached. If dissatisfied importers, after exhausting the remedies provided by the statute to ascertain and determine the fair dutiable value of imported merchandise, could apply to the courts to have a review of that subject, the prompt and regular collection of the Government's revenues would be seriously obstructed and interfered with.

Does the language of the decision in the other *Passavant Case* (169 U. S., 16), holding that an appraisement may be impeached "where the appraiser or collector has proceeded on a wrong principle contrary to law, or has transcended the powers conferred by statute," withdraw the present case from the general rule?

It is argued by petitioner, in effect, that this being a purely legal question concerning the effect to be given to section 19 of the customs administrative act (as to which see the opinion of the circuit court of appeals), and the question being of wide importance and application, a valid reason for review by the courts of the action of the appraising officers, and by this court as the ultimate court of appeal, is presented, notwithstanding the statutory finality of the appraisement as made by the regular officials. But there is nothing in the customs administrative act to suggest that the appraisement is only final and conclusive when there is not in the case a purely legal question of such far-reaching consequences as the present one seems to the importers. It may be suggested that the consequences as to merchandise other than sugar may be left to the importers of such merchandise.

IV.

In the petition (p. 5) the importers state that upon the interpretation of this statute payments of large amounts of money depend. I am advised by the Treasury Department that the amount involved in this suit and pending protests is approximately $70,000. An authoritative and final decision of the question having now been reached, and the Treasury Department having already applied the rule therein announced (and continuing, of course, so to do), both to such merchandise as is here involved and to other merchandise presenting the same question, it is not necessary to assume that the amount of money involved will be increased as other cargoes come in, because if

the court deny this application, the rule of practice has been fixed and protests and endeavors to review will be fruitless; and therefore the duties already determined to be legal will be promptly paid, and the rule of valuation and assessment, applied uniformly and for a long time, will necessarily be accepted. Nor is it necessary to assume that the courts of other circuits may not follow the action of the courts of the second circuit. Conflicting decisions are not to be anticipated. Therefore, as the matter stands, there is no doubt at all as to what the rule of law and the rule of practice is, and all importers of such merchandise, or of other merchandise respecting which this question may be pertinent, will not be uncertain as to the rule of appraisement. Indeed, the rule has not been doubtful in the past, for in Syn. Dec., 9305, and in earlier decisions, it was applied and has been maintained ever since (S. 10661). Nor will they be ignorant of the value of their merchandise, either when exported from the foreign country or when imported into this country, except so far as ignorance on the subject may necessarily inhere in the methods of their business or the nature of the commodities in which they deal. The law as now announced is not responsible for such an uncertainty.

V.

The plain statement of the fact here is that the importers claim that the duty should be chargeable upon the *quantity* actually imported in accordance with the rule of *Marriott* v. *Brune* (9 How., 619), and yet are not

willing to admit the countervailing claim that the diminished weight or quantity is nevertheless equal in value to the weight or quantity shipped. The truth of it is that under section 7 of the customs administrative act the importers might properly enough, along with their written entry of the merchandise, have allowed for the diminished weight but increased value per unit of weight by making, themselves, an equivalent addition to the cost or value per unit of weight given in the invoice. Do the importers think that Congress evidently contemplated the possibility of a change in the condition and consequently in the value of merchandise during the voyage of importation, and yet, when the change in value was an increase, acquiesced in the legality of exempting the increase from duty?

In section 23 of the customs administrative act, providing that there shall be no damage allowance, but that the importer may be relieved of the payment of duties upon damaged goods abandoned to the Government, the law does not bear the harsh construction which the petitioners seek to put upon it in their brief, because the language is scrupulous to allow the importer to separate from the remainder that portion of the goods so far damaged as to render their abandonment to his advantage, and retain the former upon payment of duties, with the entirely just proviso that the abandoned portion shall amount to 10 per cent of the total invoice.

In the case of these sugars, and in other similar cases, there is no deterioration, but the contrary; and as the importers in such cases are taking no harm from section 23 it is difficult to see why a compensation, imperfect or

otherwise, is due them under section 19. It may well be that under its revenue power and the necessary revenue regulations the Government is exactly in the position of demanding legally of an importer of merchandise which undergoes damage during the voyage (not mere change of condition) that the dutiable value shall be ascertained before the change, the abandonment provision sufficiently guarding the importer's rights; and on the other hand, that the dutiable value shall be ascertained after and not before a change of condition which increases the value. The apparent dilemma on this point in the importer's brief needs some such revision as the foregoing; and the courts below, by their opinions, gave it, in effect, just this revision.

VI.

The evil seen by the learned counsel for the petitioners because of the importers' uncertainty under the decisions herein, whether or not the merchandise will increase or decrease during the voyage, and whether or not, therefore, the duties upon imports may be calculated in advance, has been referred to and has been, I think, shown to be unfounded. The custom of the trade referred to in the opinions and in the evidence (pp. 21–22, 30, 46) in taking stipulations for a conditional price based upon the percentage of loss of weight within certain limits by decreased moisture, should enable the importers to forecast these doubtful and uncertain elements. This custom shows clearly that the Brazil price or value *was* the price or value less the water for which extra allowance was made. Certainly the rule of law announced does

not prevent them from doing so, and the contention that duty is paid twice, on the theory that a large part of the sugar customarily drains away into the bilge in the course of the voyage, appears to be both extravagant and irrelevant. It is extravagant because the reference in the record in case No. 2689 (circuit court of appeals), page 23, expressly states that the loss in weight during the voyage is due almost entirely to drainage of *water*. "There may be some loss—there may be some destruction or some damage by which some of the sugar is washed away; that I don't know. In all ordinary shipments of these goods the principal loss is due to the *evaporation or the water being eliminated from the sugar*." The contention is irrelevant, because it appears by the record in the other case (No. 2676, circuit court of appeals, p. 35) that the drainage "might be worth considerable and might not be worth much," and that it is not of sufficient value for the importers themselves to provide for its recovery and entry; and that it is unclaimed, unless, in a few instances only and when it is worth while, the captains of the vessels choose to enter it and pay duty on it.

Judge Townsend in his opinion puts the whole case in a nutshell when he says:

> It appears, therefore, that if the sugar had been kept for the same length of time in Brazil, the same loss in weight by drainage and increase in value per pound would have taken place there, and the value of the cargo as a whole would not have been affected thereby. If this be so, I do not think the importer should gain by the decrease in weight coupled with an increase in value per pound.

VII.

The "iron ore" instance is not analogous. *Earnshaw* v. *Cadwalader* (145 U. S., 247) decided that no statute ever permitted an allowance for the water chemically combined with iron ore, and that the act then in force (1883) "must have the same construction in regard to all moisture, *however mixed or combined with the ore*," which obviously included the moisture mechanically absorbed on the voyage of importation. The question whether "dried ore" was an article known to commerce was held to have been properly submitted to the jury, and the judgment upon the verdict in favor of the collector was sustained. This is the full import of the decision. No doctrine can be drawn from that decision which is significant here. It can not be held that because the moisture still in the ores was not deducted in that case, therefore the moisture which is actually drained away in this one shall be charged back against the importer, for that, of course, is not the importer's argument here, and all the authorities agree that the *weight* when landed is the test; and if the doctrine to be deduced is that the moisture shall not be so charged back, that was the result actually reached. But the *value* of the resulting weight having proportionately increased, the loss in weight was exactly offset. Now, on this remaining point *Marriott* v. *Brune* (*supra*) is instructive. That case decided that the weight when landed is the test, *although the aggregate value is thus reduced below the cost named in the invoice.*

If, however, the aggregate value, under such peculiar circumstances as here, had been maintained at or restored

to the aggregate cost named in the invoice, will it be argued that the weight would have been reduced without allowing for the relative increase in value? I think the decision itself, in favor of the importer, shows the contrary, for one ground thereof is thus stated by the court (9 How., 633): "Nor is his sugar improved in quality by the drainage so as to raise any equity against him." In the case at bar this very equity is raised against the importer, and *Marriott* v. *Brune* clearly requires the conclusion that if the same circumstance had existed there, either the weight would not have been reduced or the value per unit of weight would have been increased.

In view of all the facts it is submitted that the importer was not entitled at all to review by the courts, and that the present aspect of the question is not of such "gravity and importance" (*Lau Ow Bew* v. *United States*, 144 U. S., 47, 58) as to call for the writ.

JOHN K. RICHARDS,
Solicitor-General.
HENRY M. HOYT,
Assistant Attorney-General.

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